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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 109.

JAMES COLEMAN AND THEODORE H. N. McPHERSON, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 23, 1890.

(14,042.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 14, 1893.

1 In the Court of Claims.

JAMES COLEMAN and THEODORE H. N. McPHERSON
vs.
THE UNITED STATES. } 16410.

I.—*Petition. Filed December* 15, 1888.

The petition of James Coleman and Theodore H. N. McPherson respectfully represents and shows to the court that they are each citizens of the United States, the said James Coleman residing in the State of Wisconsin, and the said Theodore H. N. McPherson in Washington, in the District of Columbia, and both doing business as lawyers in said District.

Your petitioners further show that the said defendant, The United States, is indebted to them jointly for legal and professional services rendered by them for the said United States, and at the request of the said United States, during the years 1882, 1883, and 1884, in the sum of ten thousand dollars.

That said indebtedness is founded upon an implied contract; and that the circumstances under and upon which the same accrued, as your petitioners are informed and believe, are as follows:

2 That in the year 1843, the government of Mexico granted to Guadaloupe Miranda and Carlos Beaubein, citizens and residents of Mexico, a tract of land, then situate in Mexico.

That about the year 1860 Congress passed an act confirming the lands contained in this grant to the said Beaubien and Miranda.

Subsequently, the said Beaubien and Miranda conveyed these lands to the Maxwell Land Grant & Railway Company, and thereafter they were surveyed by the Government of the United States, and a patent for the lands so surveyed was issued to the said company.

That, as your petitioners are informed and believe, the grant of said lands from the Mexican government contained about one hundred and twenty-four thousand acres. That the lands included within the survey aforesaid embraced about two million acres, and included lands both in the Territory of New Mexico and the now State of Colorado, the excess included in said survey belonging to the U. S. being of great value, to wit, of the value of two million dollars.

Your petitioners further show that of said lands so included in said alleged fraudulent survey, a portion of them were claimed by persons who had become actual settlers and residents thereon prior to the confirmation of said survey; but that by far the larger proportion thereof were at the time hereinafter mentioned claimed by or belonged to the United States.

Your petitioners further show that in the year 1881 certain of the settlers upon said lands, who claimed that their right to possession of the same had been invaded by the said company, determined to commence legal proceeding to test the title of said company to so

much of said lands as it was claimed had been fraudulently conveyed to said company by the United States.

3 That to that end in the year 1881 they retained and employed your petitioners, James Coleman and Theodore H. N. McPherson, and requested them to take such proceedings as in their judgment might be necessary to determine the question of the right of the company to the lands which had been included in said survey. That thereupon your petitioners commenced an investigation of the facts connected with the said alleged fraudulent survey and expended much time and labor in so doing.

That thereafter and in the year 1881 your petitioners, for and on behalf of said settlers by whom they had been retained, applied to the then Attorney General of the United States for leave to bring suit in the name of the United States to vacate the patents which had theretofore been granted as aforesaid to said land grant company. That on such application your petitioners were on or about the time last aforesaid duly authorized to begin suit for the purpose aforesaid in the name of the United States, both in the Territory of New Mexico and in the State of Colorado; and in pursuance of such authority drew and prepared two bills in equity, one to vacate and set aside the patents which had been granted under said fraudulent survey to the lands in New Mexico, and the other to set aside and annul the patents to the lands granted to said company which were situate within the State of Colorado.

That thereafter your petitioners filed the bill so prepared by them to set aside and vacate the patent to the lands lying within the State of Colorado in the United States circuit court for the southern district of Colorado. That the parties defendant to said bill in equity were The Maxwell Land Grant Company and other defendants.

That the said Maxwell Land Grant Company and other of said defendants within the time required by law filed their an-

4 swer to said bill; and the court by order fixed the time within which the said United States as complainant and the said defendants should close the taking of their testimony, to wit, in the month of September, 1883.

Your petitioners further show that in preparing said bills in equity, and in the preparation of said causes for trial to the time aforesaid, they expended much time and money. That they were required to and did investigate all of the maps and proceedings connected with the issuing of said patents, which were a part of the files and records in the office of the Commissioner of the General Land Office and in the Department of the Interior, and did make an abstract of the title to said lands.

That they were required to and one of your petitioners did on two separate occasions go to New Mexico and Colorado, and make an examination of the survey of said lands, procure the names of all persons holding title under said land grant company in order to make them parties defendants to said bills in equity, and did also procure the names of witnesses who were familiar with the facts

connected with said fraudulent survey, and did generally make preparation for the trial of said cause.

That the reasonable value of said service furnished to the United States is the sum of ten thousand dollars; and money expended in the sum of $1,500.

And your petitioners further show that they were jointly employed by said settlers for the purpose aforesaid, and were to share equally in the moneys paid as compensation therefor, but no sum was fixed or agreed upon between your petitioners and the said settlers as to the amount they should receive for said services, and only the sum of $177.00 was paid to or received by your petitioners in compensation for said services or in reimbursement for said moneys so expended.

5 That in the fall of 1883 your petitioners were notified by said settlers, by whom they had been retained as aforesaid, that they could not furnish any more money to defray the expenses of the trial of said causes, neither could they pay attorneys any sum in compensation for services rendered by them for the reason that almost all of the lands embraced within said fraudulent survey belonged to, and would, in case of a successful result of said litigation, revert to the United States and not to the settlers, and that as the benefits to arise from said litigation were to result to the United States it should bear the expense of the same.

That your petitioners on the 16th of August, 1882, had been by the then Attorney General appointed special district attorneys—without compensation—to prosecute said suits to vacate said patent.

That on the receipt of the notice aforesaid from said settlers, your petitioners notified the duly constituted authorities of the United States that the settlers upon said disputed lands would not pay any of the expense connected with the prosecution of said suits, and requested that such expense be borne by the United States.

Your petitioners further show that thereupon and thereafter the said United States refused to further employ them, but employed other counsel, and took and assumed to itself all the benefit and advantage and profit which had accrued or been obtained by your petitioners, and availing itself of the work and labor and service so rendered by them, and of the moneys so expended by them, and of the investigations and researches and examinations made by them, and information furnished, and the commencement and prosecution of said suit in equity took and appropriated the same to itself, and proceeded with said suit so prepared by and begun by your petitioners.

6 That the service, &c., aforesaid, were and are of great value to the United States, and that it is justly indebted to your petitioners therefor in the sum of $11,500.00.

Your petitioners further show that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that your petitioners are the owners thereof, and are justly entitled to the amount hereinbefore stated from the United States, after allowing all just credits and offsets; that your petitioners have

at all times borne true allegiance to the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government, and the facts stated in said petition your petitioners believe to be true.

Your petitioners therefore pray judgment in their favor and against the United States for the sum of eleven thousand five hundred dollars.

JAMES COLEMAN AND
THEODORE H. N. McPHERSON,
Attorneys in Propria Persona.

CITY OF WASHINGTON, }
District of Columbia, } *ss:*

Theodore H. N. McPherson, being duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

T. H. N. McPHERSON.

Subscribed and sworn to before me the 15th day of December, A. D. 1888.

[SEAL.]

A. S. TAYLOR,
Notary Public.

7 II.—*Demurrer. Filed by Defendants February* 9, 1889.

And now come the said defendants, by their Attorney General, and, demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Ass't Attorney General.

8 III.—*Argument and Submission of Case, May* 13, 1889.

At a Court of Claims held in the city of Washington on the 13th day of May, A. D. 1889.

The cause of Coleman and McPherson on demurrer was argued by Mr. Assistant Attorney General Howard for the demurrer and by Mr. McPherson and Mr. Coleman opposed and submitted.

9 IV.—*Judgment for the Defendants on the Demurrer. Petition Dismissed.*

At a Court of Claims held in the city of Washington on the 20th day of May, A. D. 1889.

In the case of James Coleman and Theodore H. N. McPherson *vs.* The United States, No. 16410, the demurrer of the defendants to the

claimants' petition was sustained, and it was ordered that the petition of the said claimants be dismissed.

BY THE COURT.

(The court did not file an opinion in the case.)

10 V.—*Application of Claimants for and Allowance of Appeal.*

COLEMAN AND MCPHERSON
vs.
THE UNITED STATES. } 16410.

From the judgment rendered in the above-entitled cause on May 20th, 1889, in favor of the defendants the claimants, by their attorney, on the 10th day of August, 1889, make application for and give notice of an appeal to the Supreme Court of the United States.

T. H. N. MCPHERSON,
Att'y in Propria Persona.

Filed August 10, 1889.

Allowed in vacation, August 10, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

11 In the Court of Claims.

JAMES COLEMAN and THEODORE H. N. MCPHERSON
vs.
THE UNITED STATES. } No. 16410.

I certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment of the court dismissing the petition on demurrer, of the application of the claimants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at the City of Washington, on this 19 day of October, A. D. 1889.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 14,042. Court of Claims. No. 109. James Coleman and Theodore H. N. McPherson, appellants, *vs.* The United States. Filed May 23, 1890.

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CLERK.

Supreme Court of the United States.

October Term, 1893.—No. 109.

JAMES COLEMAN and THEODORE H. N. McPHERSON,
Appellants,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

EDWIN B. SMITH,
Of Counsel for Appellants,
120 Broadway.

T. H. N. McPHERSON,
In Propria Persona.

Press of McGILL & WALLACE, 1107 E Street N. W.

Supreme Court of the United States.

OCTOBER TERM, 1893.

JAMES COLEMAN and THEODORE H. N. McPHERSON, Appellants,

vs.

THE UNITED STATES.

No. 109.

BRIEF FOR APPELLANTS.

STATEMENT.

In regard to a Mexican land grant (to Beaubien and to Miranda) subsequently confirmed by the United States (12 Stats., 71), the question arose whether the patents should be for less than 200,000 acres or for nearly two million acres. (Petition, p. 1, fol. 2; 121 U. S., 326–327.)

Prior to this confirmation, part of these lands had come into the occupation of actual settlers, but up to 1879, when the patents issued (121 U. S., 327, top) by far the larger portion of this immense tract remained the absolute property of the United States, and was of corresponding value—aggregating over $2,000,000 at the Government price per acre. (Rec., *Ib.*)

The claim for the extended grant was rejected by Secretary Cox in 1869, and by Secretary Delano in 1871 and the patent was not issued until May 19, 1879, when the patent applied for in March, 1877, was granted. (121 U. S., 326–7.)

These facts are mentioned to show the *bona fides* of the

controversy, its magnitude, and the importance which the land officers of the Government attached to it. (122 U., S., 366, 370.)

In 1881 certain settlers, anxious to vindicate their right to pre-empt the lands which they had taken up and improved (as public), with this view instituted proceedings to test the validity of the patent of May, 1879 in excess above twenty-two square leagues. (Rec., pp. 1 and 2.)

They employed the appellants to institute these proceedings. (*Id.*)

After satisfying themselves by protracted and patient investigation of the merits of the claim, Messrs. Coleman & McPherson procured authority from the Attorney General to file, and did file, two bills in equity in the name and, principally, in behalf the United States to set aside this patent covering lands in New Mexico and Colorado. (*Id.*)

The settlers were to pay the appellants upon a *quantum meruit* for their services (*Id.*); but nothing has been paid them either for their labor or their disbursements except $177 (*Ibid*, p. 3) for which they ought to receive $11,500. (*Ibid.*)

In their petition to the Court of Claims, brought here by their appeal, the appellants further state that—

"Your petitioners further show that in preparing said bills in equity, and in the preparation of said causes for trial to the time aforesaid, they expended much time and money. That they were required to and did investigate all of the maps and proceedings connected with the issuing of said patents, which were a part of the files and records in the office of the Commissioner of the General Land Office and in the Department of the Interior, and did make an abstract of the title to said lands.

"That they were required to, and one of your petitioners did, on two separate occasions, go to New Mexico and Colorado and make an examination of the survey of said lands, procure the names of all persons holding title under said Land Grant Company in order to make them

parties defendants to said bills in equity, and did also procure the names of witnesses who were familiar with the facts connected with said fraudulent survey, and did generally make preparation for the trial of said cause. (Rec., p. 2, fol. 4.)

* * * * * * *

"That in the fall of 1883 your petitioners were notified by said settlers, by whom they had been retained as aforesaid, that they could not furnish any more money to defray the expenses of the trial of said causes, neither could they pay attorneys any sum in compensation for services rendered by them, for the reason that almost all of the lands embraced within said fraudulent survey belonged to and would, in case of a successful result of said litigation, revert to the United States, and not to the settlers, and that as the benefits to arise from said litigation were to result to the United States, it should bear the expense of the same.

"That your petitioners on the 16th of August, 1882, had been by the then Attorney General appointed special district attorneys—without compensation—to prosecute said suits to vacate said patent.

"That on the receipt of the notice aforesaid from said settlers your petitioners notified the duly-constituted authorities of the United States that the settlers upon said disputed lands would not pay any of the expense connected with the prosecution of said suits, and requested that such expense be borne by the United States.

"Your petitioners further show that thereupon and thereafter the said United States refused to further employ them, but employed other counsel, and took and assumed to itself all the benefit and advantage and profit which had accrued or been obtained by your petitioners, and availing itself of the work and labor and service so rendered by them, and of the moneys so expended by them, and of the investigations and researches and examinations made by them, and information furnished, and the commencement and prosecution of said suit in equity, took and appropriated the same to itself, and proceeded with said suit so prepared by and begun by your petitioners.

"That the service, etc., aforesaid were and are of great value to the United States, and that it is justly indebted

to your petitioners therefor in the sum of $11,500." (Rec., p. 3, fol. 5.)

A demurrer was filed to the petition (Rec., p. 4, fol. 7), which was sustained by the Court of Claims (Rec., 4, 5) and a decree there entered, dismissing the petition (Rec., *Ib.*); from which decree the present appeal was taken. (Rec., 5.)

Assignment of Errors.

The appellants assign for error—

"1. The sustaining of the demurrer to the appellants' said petition. (Rec., 4, 5.)

"2. The decree dismissing appellants' said petition. (Rec., 5.)

Points.

The brief for the Government, with which we are favored, rests the argument wholly upon the ground that the circumstances under which the appellants prepared for, prepared and filed the two bills in equity mentioned in the petition, were not such as to raise any implication of a promise by the United States to pay for the time, trouble, services, and money involved.

This rests the defense *wholly* upon the ground of the limited jurisdiction conferred upon the Court of Claims by section 1079 of the Revised Statutes over contracts, expressed or implied. The "Tucker act," however, expressly repealed this section, and gave that court authority to hear and determine—

"(1) All claims founded upon the Constitution of the United States; * * * or (2) upon any contract, expressed or implied, with the Government of the United States; or (3) for damages, liquidated or unliquidated," etc., in respect of which the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, "if the United States were suable" (24 Stat., 505).

Wherever a constitutional provision requires pecuniary compensation to be given to protect a man in his rights of property, or there is any legal contract or equitable ground for such protection, the Court of Claims has authority to extend it, and adjudge the amount of the necessary compensation.

Believing the circumstances mentioned in the petition did raise the implication of a promise to pay what the services and money expended were reasonably worth, we contend that the court below should have heard and determined our cause if we presented a claim for personal services rendered, money expended, or of property rights taken (not tortiously), which the Constitution requires should receive "just compensation," or which a court of equity would say ought to be enforced by a moneyed judgment.

I.

Just Compensation for Property Taken.

Item "First" of section 1, acts of 1887, c. 359 (24 Stats., 505), above quoted, manifestly states, as *separate* grounds of jurisdiction in the Court of Claims, cases which arise under the Constitution, *not* resting upon express contract, for the latter are provided for in the next member of the sentence, and were previously cognizable in that court, while this constitutional ground of jurisdiction is new.

The Court of Claims (rightly, no doubt) consider that it is meant to cover such cases as this court (in Langford *v.* U. S., 101 U. S., 343, bottom) regretted were not adequately provided for;—and others that might arise.

Stovall, 26 Ct. Clms., 239, top;
U. S. *v.* Hill, 149 U. S., 602, top.

This court has said this act only conferred authority to hear and determine causes in which a decree or judgment for money would be the appropriate remedy.

U. S. *v.* Jones, 131 U. S., 18.

No writ of ejectment would lie, to put the Government out of possession of premises upon which it was alleged to have unlawfully intruded, nor to try the title to disputed territory, with a view to obtain its value from the United States, if the title of the claimant prevailed. U. S. *v.* Hill, 149 U. S., 593, where it is noted (p. 598) that assumpsit for use and occupation can not be maintained upon an adverse possession of real estate—which was Langford's case (101 U. S., 344). It may for a consent taking.

U. S. *v.* Gt. Falls, 112 U. S., 645;
And 124 *Id.*, 581.

This is not true, however, of personal actions; for, as to money or chattels (obtained by trespass or force even), which *exæquo et bono* the defendant ought not to retain, the law conclusively presumes a promise to restore, or to pay the value.

Hollister *v.* Benedict, 113 U. S., 60.

All contracts, express or implied, were before suable in the Court of Claims. "The manifest scope and purpose of this act of 1887" (c. 359, § 1, especially this first sentence), "are to extend the liability of the Government to be sued" to a *subject*, as to which there was, theretofore, no such liability.

U. S. *v.* Harmon, 147 U. S., 276.

The "property," valuable information, money, and acquisitions of the appellants were involved and embraced in the suits they instituted, and in the complainants' bills of complaint and papers therein. They were all taken by the United States and applied to its own further prosecution of these actions. (Rec., 3, fol. 5.)

Russell *v.* Ralph, 53 Wis., 331;
Dorrance St., 4 R. I., 245–6.

There is no question about the method by which the United States availed herself of the services and expen-

ditures of the petitioners; no claim of any greater right than these circumstances conferred, though this court has intimated that, as to *personal* claims or privileges, it is immaterial whether the action of the Government be permissive or adverse.

Hollister *v.* Benedict, 113 U. S., 60–67;
U. S. *v.* Palmer, 128 *Id.*, 262.

II.

Implied Contract.

The circumstances of the transaction were such as to constitute an implied contract to pay the value, as they would have raised the implication of such a promise between individuals.

The United States, knowingly and deliberately, availed herself of the work done and money put out by the petitioners. Every case must depend upon its own circumstances; those of *this* case show it was so done as to imply a promise of compensation. The use by the Government of a citizen's money and labor would ordinarily imply such promise; hence we have only to consider if those facts upon which the defense relies constitute an exception.

The prominent fact upon which the Attorney-General lays stress is that the petitioners did not originally expect to be paid from the United States Treasury; yet, it is equally true and a full answer, that they did not expect the United States to become the active and real prosecutor of the litigation. In short, a state of facts arose which neither party anticipated in the beginning; and, upon this changed condition of things, each did what neither party contemplated at the outset. The new status created new obligations, and a liability arose which before then did not exist. When the bills in equity were drawn it was not supposed the United States would adopt

them actively. When the petitioners paid out moneys to ascertain testimony, clerk's fees, etc., it was never imagined that other counsel, representing and paid by the Government, would use that testimony. Neither party dreamed of such a thing.

Our claim is not, as defendant's brief assumes, to be paid *simply* because we did work and expended money; but because, when there was no compulsion to do so, the United States took the benefit of the toil and of the expenditure. The Government did not originally purpose to conduct these causes at its own expense and by its control. Had it adhered to this original intent, no obligation would have arisen. It could have done in the end what it proposed in the beginning—nothing; but when it changed its position, it changed its obligation. It took away the chance petitioners had to induce their clients to pay by stepping forward and saying: "The United States will prosecute." Thereafter, of course, the private litigants would not pay anything.

"It not infrequently happens that, in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and consequently where no intention has been expressed by them, or can be inferred by their acts [as to the effect of such contingency]. In such cases the law prescribes their respective rights and liabilities *according to the dictates of justice*—that is, of general expediency, and according to what it is presumed their intention would have been had they had those circumstances in their consideration when they made the contract. In a third class of cases the law prescribes the rights and liabilities of persons who have not, in reality, entered into any contract at all with one another, but between whom circumstances have arisen which make it *just* that one should have a right and the other should be subject to a liability similar to the rights and liabilities which exist in certain cases of express contract."

Addison on Contr., 23.

Referring back to the above-quoted passage, the same author writes, further along in his work:

"We have already seen that the law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words; and that such contracts are implied sometimes in furtherance of the intention or presumed intention of the parties, and sometimes *in furtherance of justice, without regard to the intention of the parties.*" (*Id.*, 1025.)

These last are frequently called "constructive contracts," as existing by an irrebuttable presumption of law. They are like constructive trusts in equity; and a court with equity powers may construe the circumstances to constitute a contract, where a law court would say one was implied. Generally, so-called constructive contracts are spoken of, and treated, as implied; are comprehended within that term; though, in exceptional instances, a few courts have made this further division and distinction.

There is no very great difference between us as to those familiar principles of law which are discussed in our respective briefs; but, as usually happens, the real issue is as to the *application* of them to the established facts.

We respectfully submit that the position assumed by the Attorney General, and the citation by which it is supported, have no applicability to the cause at bar.

For example: Commencing the argument (at p. 3, Attorney General's brief) with a paragraph supposing a state of facts that would certainly imply a promise of payment, it is added that no such promise is implied from a defendant's mere knowledge and enjoyment of plaintiff's work. The brief then proceeds:

"It must be shown that the plaintiff, *at the time the labor was performed* and continuously during such time, expected the *defendant* to pay for it;" to the defendant's knowledge, who nevertheless permitted the work to go on. (Attorney General's brief, p. 3.)

Ten cases are cited to support this proposition; how far they do so, in the form in which it is presented, will be noted briefly bye and bye; what we now desire to do is to challenge the accuracy of the italicised portion of the foregoing quotation.

Disregarding the irrelevant case of unauthorized or gratuitous work done upon defendant's property, which he must either lose the use of, or enjoy the benefit of the improvemants made thereon, we contend that, as to an article *not* his when made; or as to work done upon property *not* then his; or performed upon his property, with his consent, for the benefit of another who he knows is expected to take and pay for it, and the defendant *subsequently* determines to take the benefit of the work himself, though not compelled to do so, or to part with what is his; and in all *analogous* cases (of which ours is one), the implication of a promise to pay arises whenever the defendant elects to enjoy the fruits of a labor not performed originally for his benefit, nor to be *given* to anybody.

The ordinary inference arising from one taking the benefit of another's means and efforts is, that the latter is to be reimbursed therefor. Do the circumstances stated in our petition rebut this presumption in the present instance? We say not; and the authorities cited for the defendant neither sustain any such position, nor the proposition which they are cited to support.

None of them are cases, such as this is, where the person doing the work always expected to be paid for it, either by him for whom it was originally done, or by him who ultimately elected to take the benefit of it (in lieu of the original contractor), though under no constraint to do so.

In the first-cited (Mass.) case, an implied promise to pay for the services was found and enforced; defendant's "knowledge that they were valuable, and *his exercise of the option to avail himself of them*, justify this inference." (119 Mass., 515.)

The Missouri case was simply where one, proposing to lend $25,000 upon corporate bonds, of his own motion asked his own attorneys to see if their issue was legal; and they sued the corporation for this investigation, which the court said was for his own benefit; but as to the *printing* of the bonds, it held the inference of a promise to pay *did* arise "if the defendant had *accepted the benefit* of that work and refused to pay for it." (81 Mo., 144.)

As the defense thrice refer to this case, we ask the court to observe how widely its facts differ from those of the present case.

In the early Massachusetts case—a father let his son build a house upon the paternal farm—held not to make the father liable to the son's creditors upon trustee process for its value, *because* (as the court say) *the father never took possession* of it. (4 Mass., 514.)

Conversely, it is clearly implied that if, after he had let the son build for himself the father *had* taken possession, he *would* have become so liable.

The earlier Maine case is the erection of a bridge which the plantation officers had repeatedly forbidden the plaintiff to build. Its bearing on the present case will best be seen by a short excerpt from the opinion:

"If a man will voluntarily build a house, or make any other erection, upon the land of another against the will and *against the protestations of the owner*, although his estate may be rendered more valuable by the erection, we have been referred to no case which decides that he is under obligation to pay for it; at least, *until* he has manifested some unequivocal act of acceptance." (14 Me., 27.)

The other Maine case holds that a district does not have to abandon its schoolhouse or else pay for *unauthorized* repairs. (24 Me., 349.)

Defendant's five following citations (defendant's Brief,

p. 3) are all instances of services always understood to be gratuitous when rendered and *when accepted;* like son's work on the home farm, etc., etc.

We have referred more in detail to defendant's first five citations because each one contains some statement that facts like those existing in our case *would* create the inference of a promise to pay.

We fail to find pertinency in defendant's subsequent citations.

Defendant argues (Brief, p. 4) no such inference arises in our case because "the appellants *never* expected compensation from the respondent." Not so; such was the expectation when the United States became the real actor. If it means such was not the *original* expectation, we say—neither was it then understood the Government would itself *directly use* the fruits of our labor and expense.

It is the reverse of true to suppose (same Brief, p. 5) "that the Government derived some benefits *incidental to a breach of the contract between the appellants and their clients.*" Had there been *no* breach, the United States would have had the validity of the patent involved determined without expense to herself. Because of the breach she lost this benefit, and had to decide whether (1) to acquiesce in the validity of the patent, (2) institute a new proceeding to determine the question, or (3) actively assume the conduct of the pending cases. She chose this third course, and then, for the first time, *directly* took the benefit of petitioner's time, trouble, and money. Indeed, to that time the United States had received *no* benefit from this source; if ever to derive any, it would be *incidentally* from another's contract. The bills, *per se*, the testimony, when collected for taking, did not benefit the United States at all; but when, instead of a patient she became an actor, she had to take up these

bills or file new ones at her own expense; she had to use these witnesses and their statements or hunt up these or new ones at infinite cost and trouble, and *then* she elected to take for herself what had been provided for another.

The benefit which *might* accrue under the original arrangement was merely incidental and contingent; that which she did actually derive when she assumed the prosecution, was direct, present, and absolute.

A fallacy lurks in the reiterated expression as to "the time when the services were performed" (Brief, pp. 3, 6, etc.). The professional skill exercised in drawing the bills of complaint, the labor and expense of preparing the testimony were of no "service" to anybody unless the suits were prosecuted, and then only to the party prosecuting. They became a "service" to the United States when the United States became the prosecutor.

A box or piece of furniture is made (upon my premises, by my permission, and even with my tools, if you please) for one who, before or after its completion, repudiates his contract and refuses to accept it—whereupon I take it and use it:—though the work was originally gratuitous *as to me* (as the Government brief in this case repeatedly phrases it), yet I became liable to pay for it, such as it then was, *when* I took it, *because* I took it.

Louisville v. *Wilson, 138 U. S., 507;*
U. S. *v.* Russell, 13 Wall., 623;
Solomon *v.* U. S., 19 *Id.*, 17;
Gill *v.* U. S., 20 *Id.*, 517;
Hersch *v.* U. S., 15 Ct. Clms., 391;
Mills *v.* U. S., 19 *Ib.*, 94–95.

Defendant says (Brief, 9) that the *facts and circumstances* of those cases raised an implied promise, which those in our case do not. On the contrary, we think our facts *do* raise the implication. Though the circumstances are different from those of the cited cases, all present the same equity.

At the top of last-mentioned page of our opponent's brief (p. 9) we find the statement that these equity suits were "discontinued," immediately qualified by the suggestion that the settlers' failure led to their "substantial" discontinuance. On the contrary, the petition specifically states (Rec., 3, fol. 5) that petitioners' request was to have the United States assume the expense, and the Government, refusing to employ them, prosecuted the suit, etc.

Whatever the scarcity of provender for the ravens of the law, where the carcass was there were the *eagles* gathered together (26 F. R., 118); and the American eagle drove off all other participants of the feast, in a manner that recalls Dickens' description of our national bird.

The argument and motion for reargument of the cause (121 U. S., 325 and 122 *Id.*, 365) show that the highest officers of the Government remained, to the last, confident that here was spoil that *ought* to be plucked from the teeth of the wicked; great public interests that ought to be protected *by means of that suit;* though these functionaries were neutral and indifferent until they saw how strong a case the present petitioners had worked up. The report of the equity case below (26 F. R., 118) shows the *voluminous* testimony taken and immense preparation made, and the petition states (page 2, fol. 4) that all the testimony had to be closed in September, 1883, and the petitioners were dropped out in the fall of that year. (Rec., 3, fol. 5.)

True, the bill was dismissed (121 U. S., 325, and 122 *Id.*, 365), but under circumstances that do not justify the treating of the private counsel who initiated it as birds of prey, croaking over bones. We care nothing for the epithet of counsel; we do that the Government treats us correspondingly.

III.

Equitable Considerations.

The facts which constitute an equity tend to raise the implication of a promise; yet—in view of the language of the act of 1883, c. 359, authorizing a judgment of the Court of Claims against the Government in cases (not founded on wrong doing) like those in which a court of equity would decree relief between individuals—it is thought proper to suggest a few more equitable considerations under this separate head.

In the condition in which the equity suit was, in the fall of 1883, no private litigant could have changed his attorney without making or securing payment for the services rendered by the superseded attorney; that attorney would have had a lien upon his client's papers to secure himself.

Situated as we were, compelled to use the name of the United States, and to constitute the Attorney General the *dominus litis*, we could not assert these rights, nor enforce this lien; but that did not in the least diminish the equity of our claim, which the act of 1883 authorizes us to enforce through the Court of Claims.

The papers which were the result of our industry were handed over to another for the further prosecution of the cause; but we had an equitable lien for our services in preparing and collecting them.

When the United States took them, it took them *cum onere*, coupled with the obligation to pay us for them.

"We think it may fairly be held that the party who takes the benefit of such a service ought to pay for it; and that equity may properly decree payment therefor."

Louisville *v.* Wilson, 138 U. S., 507;
Read *v.* Dupper, 6 T. R., 361;
Renick *v.* Ludington, 16 W. Va., 392;
Mahone *v.* So. Tel., 33 F. R., 702;

In re Paschal, 10 Wall., 483;
Brown *v.* Bigley, 3 Tenn. Ch., 623;
Cowdrey *v.* Galveston, 93 U. S., 352;
Wylie *v.* Coxe, 15 How., 415.

This is as true of our confiscated claim upon the *papers* as it would be if there had been a judgment for the complainant in the equity suit.

IV.

The judgment should be reversed, and the demurrer overruled.

T. H. N. McPherson, *in pro. per.*
Edwin B. Smith,
Of Counsel for the Appellants.

No. 120 Broadway, New York.

In the Supreme Court of the United States.

COLEMAN AND MCPHERSON, APPELLANTS,
v.
THE UNITED STATES, RESPONDENT.
No. 109.

BRIEF OF ARGUMENT FOR RESPONDENT.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims sustaining a demurrer interposed by respondent to the petition of the appellants.

The pertinent facts, as disclosed by the said petition, are as follows:

In 1881 certain settlers upon portions of the land embraced within the confines of the Maxwell land grant, employed the appellants to institute proceedings for the ascertainment of certain boundaries in said grant. In order to overcome certain legal objections and for the furtherance of their own interests, the appellants requested

the Attorney-General to permit them to institute said proceedings in the name of the United States. Their request was granted and they were appointed special assistant United States district attorneys—*without compensation*—for that purpose. That the appellants instituted said actions, and in and about the preparation of the same expended more or less time, and labor, and some money—meanwhile looking *exclusively* to the settlers on the grant, their clients, for their compensation and reimbursement. In 1883, however, the said settlers refused further to employ the appellants or to furnish funds with which to prosecute the aforesaid suits. Appellants notified the proper authorities of the respondent of this, and requested it to defray the expenses of the litigation. This the respondent refused to do and refused to employ the appellants in that behalf. Respondent, however, continued the suit in its own way and by its own counsel, and, it is alleged, derived benefit therein from the labors of the appellants.

Upon this state of facts appellants seek to recover from respondent the sum of $11,500, alleged value of their services and money expended, upon the theory that the respondent, having appropriated to its own use the result of their labors, the law implies a promise to pay the reasonable value thereof.

Respondent demurred, generally. Demurrer having been sustained the appellants, by their appeal, present to this court the question whether the petition of the appellants states facts sufficient to constitute a cause of action against the respondent.

ARGUMENT.

I.

If A, with B's knowledge, but without any express request, does work for B, such as people generally expect to be paid for, if B accepts the work or its results, and it is shown that A performed the work expecting to be paid for it by B, or that B did *not* honestly believe that the work was being done by A gratuitously, there is no difficulty in inferring a promise by B to pay what A's labor is worth. The doing of the work with B's knowledge is the proposal of a contract and B's conduct is the acceptance of it

A promise to pay, however, can not be implied from the fact that the labor was performed with the defendant's knowledge and that the defendant enjoyed the benefit of such labor. It must be shown that the plaintiff, at the time the labor was performed and continuously during such time, expected the defendant to pay for it; that the defendant knew or had good reason to know of this expectation on the part of the plaintiff, and that in the face of such knowledge the work was permitted to be done without objection.

Day v. *Caton*, 119 Mass., 513.
Holmes v. *Board of Trade*, 81 Mo., 137.
Wells v. *Bannister*, 4 Mass., 514.
Knowlton v. *Plantation*, 14 Maine, 20.
Davis v. *School District*, 24 Maine, 349.
Chitty on Cont. (11 Am. ed.), 86.
Potter v. *Carpenter*, 76 N. Y., 157.
Osier v. *Hobbs*, 33 Ark., 215.
Taylor v. *Lincumfelter*, 1 Lea (Tenn.), 83.
St. Jos. Asylum v. *Woepert*, 80 Ky., 86.
Taft v. *Dickinson*, 6 Allen (Mass.), 553.

On page 516 of the opinion in *Day* v. *Caton*, *supra*, Devens, J., says:

> If a person saw day after day a laborer at work in his field, doing services which must necessarily inure to his benefit, *knowing that the laborer expected to be paid for his work* [the italics are ours] when it was perfectly easy to notify him that his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made.

A fortiori, then, such inference can not be made in a case like the one at bar, where it is shown that the appellants never expected compensation from the respondent; where the respondent was simply doing the appellants a favor in permitting them to use its name, in return for which appellants were willing that the respondent should have whatever benefits might result from the litigation; where it is shown that the appellants were never employed by respondent, but by other persons, to whom they looked for their compensation, and that the *pro forma* appointment of these gentlemen as special assistant district attorneys of the respondent was made with the express understanding that they were to receive no compensation from respondent, and where the respondent, on the first intimation from appellants that they desired compensation

from it, promptly refused to employ or to pay the appellants. It is absurd to contend that the law implies any promise on the part of the Government to pay for the services of the appellants rendered to other persons, under such circumstances, even though it be that the Government derived some benefits incidental to a breach of the contract between the appellants and their clients.

Suppose the legal proceedings described in the petition of the appellants had been prosecuted to a successful termination and their fees had been duly paid by their clients. In that event the respondent would have derived far greater benefit from the services of the appellants than in the present instance; but surely the appellants would not have contended that the respondent was indebted to them on that account. And yet such a position is more logical than the one now assumed.

This very point has been decided against the claimant in a case very much stronger than the one at bar, and under circumstances which presented the claimant's position in the strongest possible light.

In *Holmes* v. *The Board of Trade* (81 Mo., 137) it is *held* that where an attorney is employed for a corporation by one assuming to act in its behalf, and goes on and renders services with the knowledge of the officers of the corporation and without notice that the contract is not recognized as valid, it will be held to have sanctioned and ratified the contract, and may be compelled to pay for the services. But if the corporation acquires no knowledge until after the services are rendered it will not be liable *merely because it accepts the benefit of them.*

See also:

Cravens v. *Gillilan*, 63 Mo., 28.
Middleton v. *R. R. Co.*, 62 Mo., 581.
Watson v. *Bigelow*, 47 Mo., 413.
Owings v. *Hull*, 19 Peters, 629.
Risley v. *R. R. Co.*, 1 Hun., 207.

II.

There can be no sort of doubt that the services rendered by the appellants, so far as the respondents are concerned, were originally intended to be gratuitous. When the appellants first requested that they be permitted to institute these suits in the name of the United States, they had no sort of intention of charging the Government for any "service." Indeed, the permission was given with that express understanding. The thought of charging the Government for their "services" never once occurred to the appellants until, their clients having violated their contract, they began to cast about in the hope of obtaining compensation from someone for their time and labor.

Now, it is well settled that services intended to be gratuitous at the time they are performed can not subsequently be used to raise an implied promise to pay for them.

Osier v. *Hobbs*, 33 Ark., 215.
Potter v. *Carpenter*, 76 N. Y., 157.
Taylor v. *Lincumfelter*, 1 Lea (Tenn.), 83.
St. Joseph Orphan Asylum v. *Wolpert*, 80 Ky., 86.

And this is true, even though the person performing the services was induced to do so by a state of facts mistakenly supposed to exist. *St. Joseph Orphan Asylum* v. *Wolpert, supra.*)

III.

An effort was made in the court below and will doubtless be made here, not by direct assertion, but by necessary implication from the argument used, to induce the court to hold that anything of value belonging to another taken by the Government and appropriated to its own use must be paid for. If it is intended to make such a contention as this, we submit that it is not law. Assuming that the same principles of law which govern the rights and obligations of private persons in such matters are equally applicable to the government, the law certainly imposes upon it no *greater* obligation or higher duty. Now, before the plaintiff can recover for goods or services appropriated by another, he must show a *contract*. Either there must have been an *express* promise or contract to pay the value thereof, or the thing appropriated must have been taken under such circumstances and conditions as to justify the court in *presuming* or *implying* such a promise or contract. The plaintiff can not recover *under any other* circumstances. *The mere fact of appropriation*, as was distinctly and emphatically said by the court in Holmes v. Board of Trade, *supra*, *is not sufficient*. If recovery is sought under an implied contract, then the elements of an implied contract must be alleged and proved. All the cases heretofore cited recognize and uphold this principle.

The principle is also enforced in the following cases:

Sawyer v. *Hebard*, 58 Vermont, 375.
Moyer's Appeal, 112 Pa. St., 290.
Traver v. *Shiver*, 65 Iowa, 57.
Davidson v. *Gas Light Co.*, 99 N. Y., 558.

On page 567 of the last cited case Ruger, Ch. J., says:

> But it is argued that a promise to pay for such services may be inferred from the fact of the request to perform them and the benefits derived from their performance. We do not think that such a promise can, under the circumstances of this case, be implied. A promise to pay for services is sometimes implied by law; but this is done only when the court can see that they were *rendered under such circumstances* as authorized the party performing to entertain a reasonable expectation of their payment by the party soliciting the performance. (Story on Cont., Sec. 12.)

The same principle is upheld by Mr. Justice Field on page 156 of his opinion in *Knote* vs. *United States* (95 U. S., 149).

On page 4 of their brief in the court below the appellants say:

> It is admitted that the suit of the *United States* vs. *The Maxwell Land Grant Company* was originally prosecuted with the understanding that the settlers were to pay the expenses of the suit and if it had been discontinued because they failed to comply with the agreement the claimants would not have had a legal and equitable claim against the United States for services performed. But instead thereof the United States took charge of the suit and refused to employ the claimants and appropriated to itself all the work which had been done in the suit by them.

It has already been shown under II, *supra*, that work originally intended to be gratuitous at the time it was

performed, can not afterward be used to raise an implied promise to pay for it. Besides, the facts show (see page 1 and petition) that these suits *were* "discontinued because they (the settlers) failed to comply with their agreement." When the settlers informed the appellants that they refused to defray the expenses of the litigation, they "failed to comply with their agreement," and when they were informed by the respondent, in answer to their request, that it would not employ or pay them, they certainly "discontinued" the suits—not formally, perhaps, but substantially, certainly, since "the ravens of the law do not go to feast on dry bones," as my lord Coleridge expresses it.

With regard to the cases of *United States* v. *Russell* (13 Wall., 623), *Solomon* v. *United States* (19 Wall., 17), *Gill* v. *United States* (87 U. S., 517), and other cases of that nature, it is only necessary to say that they are cases in which the *facts and circumstances* were sufficient to raise an implied promise and the court enforced the implied promise thus found. There is absolutely nothing in the cases which controverts in the slightest degree the principles here contended for. The *facts* in these cases are such as to destroy all analogy to the case at bar and to render them utterly inapplicable to it as a precedent. There is not a single fact or circumstance in the case at bar which supports the idea of an implied promise. On the contrary, they are witnesses which cry trumpet-tongued against it.

The appellants should be paid for their services, but their remedy is against the settlers who employed them.

They have no cause of action against the United States. The demurrer was properly sustained, and the judgment of the Court of Claims should be affirmed.

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